

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 4667 of 1996

For Approval and Signature:

Hon'ble MR.JUSTICE M.C.PATEL sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
  2. To be referred to the Reporter or not?
  3. Whether Their Lordships wish to see the fair copy of the judgement?
  4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
  5. Whether it is to be circulated to the Civil Judge?

1 to 5 No

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VARSHA D/O MANEKLAL M TRIVEDI

Versus

BHAVNESH HIRALAL JOSHI

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Appearance:

MR HM PARIKH for MC SHAH for Appellant

MR MB GANDHI for Respondent

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CORAM : MR.JUSTICE M.C.PATEL

Date of decision: 15/03/99

#### C.A.V JUDGEMENT

This appeal by the appellant-wife under Section 28(1) of the Hindu Marriage Act (hereinafter referred to as "the Act") is directed against the judgment and decree dated 30.9.1996 passed by the learned City Civil Judge, Court No.8 in H.M.P. No.193/93 whereby the learned Judge passed a decree of divorce and dissolved the marriage between the parties.

The respondent-husband filed the said petition under Section 13 of the Act on 2.7.1993 praying for a decree of divorce on the grounds of desertion and cruelty. The parties were married on 22.2.1988. Their marriage was soon, however, on the rocks and differences developed between the parties. According to the husband, the appellant used to leave the matrimonial home and go back to her parents without his consent. The appellant's frequent visits to her father's place without intimating the respondent created a rift between the parties. Respondent tried to bring about reconciliation but it proved unsuccessful. According to the respondent, the appellant used to quarrel with him and his family members and she used to inflict mental torture on the respondent. According to the appellant, the respondent left his place about eight times between 22.2.1988 and 19.12.1988 and during the said period she hardly stayed with him for about 74 days. Even then, the respondent used to bring the appellant back, but the respondent used to go back to her parents and inflict mental torture on the respondent. On one occasion, there was a telephone call saying that the appellant's mother was ill but when the respondent went there he found that no call had been made. But since the appellant insisted he left her there and when he went back on the next day to fetch her, the appellant and her mother said that the appellant was willing to come back if the respondent was willing to live separate from his parents and the appellant refused to come back inspite of his urging. Even on the occasion of the marriage of respondent's sister on 27.5.1989 the appellant did not come back. However, subsequently, since the appellant's sister was going to get married, the appellant came back in order to keep up appearances and she stayed at the respondent's place from 15.4.1990 to 28.4.1990 only for the sake of appearance and she left on 28.4.1990 which was the date of her sister's marriage. The respondent went to fetch the appellant on 4.5.1990 and on that day even though the appellant was not willing, she came back at the urging of her younger sister. But she picked up quarrels with the appellant and parrents on the question of living separate. But the respondent did not agree to do so. According to the respondent on 24.5.1990 when the respondent had gone to work, the appellant left the matrimonial home without informing anyone. Thereafter the respondent wrote two letters dated 4.7.1990 and 24.7.1990 urging the appellant to come back but there was no response. The appellant made a false complaint to the Jyoti Sangh. But the respondent had not received a copy of the complaint. According to the respondent, the

appellant made a false allegation of demand for dowry and beating and the allegations were made so that the respondent could not get divorce. The respondent therefore filed the petition for divorce on 2.7.1993.

The appellant-wife filed a reply to the petition denying the various averments made in the petition. She denied that she ever left the matrimonial home without the consent of the respondent or that she remained absent for a long period from the matrimonial home. She also denied that she had inflicted mental torture on the respondent as alleged. She denied that she had deserted the respondent as alleged. According to her the respondent remained totally indifferent and casual in his approach towards her. She went to the place of her father under certain circumstances as detailed in the reply. According to her, she was driven out from the matrimonial home by the respondent and his relatives. She denied that she had left matrimonial home between 22.2.1988 to 19.12.1988 as alleged by the respondent. She denied that she had deserted the respondent from 25.4.1990.

The learned trial Judge made an endeavour to bring about reconciliation between the estranged spouses in the presence of their fathers, but it was futile and fruitless. The learned Judge, therefore, raised necessary issues arising from the pleadings of the parties and recorded oral and documentary evidence. At the end of the trial, after hearing the evidence of the parties and the submissions made on their behalf, the learned Judge found that the appellant was guilty of desertion and cruelty. He held that the respondent was not taking advantage of his own wrong and that there was no unnecessary or improper delay in filing the petition and that there was no legal impediment in granting the reliefs claimed. He, therefore, by his impugned judgment and order allowed the petition and granted the decree of divorce in favour of the respondent. The appellant-wife is therefore in appeal against the said decree.

It appears that the appeal came up for admission before S.D. Shah, J. on 11.8.1997. He admitted the appeal and fixed it for final hearing on 26.8.1997. Thereafter, it appears that the learned Judge made attempts to find a solution to the problem and he passed the following order on 2.9.1997:-

"Towards further attempt for settlement and/or bringing about reconciliation between the parties. Mr.M.C. Shah, Ld. counsel appearing for wife has agreed

to keep present two conciliators, i.e. (i) Govindbhai Mafatlal and (ii) Parsuram Maneklal and the father of the wife and wife. Mr.M.B. Gandhi also agrees to keep present before this court the respondent, his father Hiralal Joshi, Ambalal Maganlal Joshi, Kantilal Mansukhlal Joshi, Ashwinkumar Kantilal. Parents of the parties are also directed to remain present before this Court on 9.9.97."

Ultimately on 26.9.1997, the learned Judge passed the following order:-

"This Court has made all attempts for reconciliation. They have failed. In the interest of justice, it will be better that this Court does not hear this appeal on merits. To be placed before Acting Chief Justice for allotting the same to any other court".

It would appear therefore that the marriage between the parties has irretrievably broken down and there is no possibility of reconciliation. The marriage is practically and emotionally dead. However, that by itself is not a ground for divorce and it remains to be seen whether the learned Judge was right in recording the finding that the appellant-wife was guilty of desertion and cruelty entitling the respondent-husband to obtain a decree of divorce.

The respondent-husband in his oral evidence stated that after their marriage on 22.2.1988, the appellant came to live with him, but differences soon developed between them and ultimately they reached a point of no return. According to him, the appellant was in the habit of leaving the matrimonial home for a couple of months and she used to return on persuasion but again leave the matrimonial home. After 1988 the respondent left the matrimonial home and stayed at the house of her father for about one-and-a-half years. The marriage of his sister took place on 27.5.1989 and at that time even though he made a request to the appellant to return to the matrimonial home, she refused to do so and insisted on living separately from the joint family. She finally left the matrimonial home on 25.4.1990 in his absence when he had gone to work. Subsequently efforts were made to bring about reconciliation and to persuade her to return, but they proved to be fruitless. The respondent's oral testimony was supported by his father who was also examined as a witness.

As against this, the appellant in her oral evidence stated that family members of the respondent

used to quarrel with her on trivial grounds and for bringing insufficient dowry and they also used to beat her and they were ill-treating her and hence she used to leave the matrimonial home at times. Initially, she bore the ill-treatment in the hope that things will be all right in due course. But there was no improvement and ultimately she was constrained to leave the matrimonial home. She has stated that at times she was driven out by the respondent and his family members and thus she was not allowed to stay in the matrimonial home. The respondent's attitude right from the beginning was totally apathetic and indifferent towards her. Even her father made an endeavour to bring about reconciliation but nothing came out of it. Hence an application was filed in the Jyoti Sangh on 10.4.1993 but the respondent remained absent and thereafter he gave notice for divorce. In her examination-in-chief, she stated that she was ready to go to the matrimonial home but the respondent was not willing to accept her. Her evidence is supported by the evidence of her father who was examined as a witness on her behalf.

Now, it appears that after the appellant left the matrimonial home on 25.4.1990 the respondent wrote two letters to the appellant dated 4.7.1990 and 24.7.1990. The letters were sent under Registered Post and they are proved to have been received by the appellant. In the said letters, the respondent, after referring to the fact that she had left the matrimonial home on 25.4.1990 in his absence and referring to her previous conduct of leaving the matrimonial home on different pretexts, made a sincere and earnest plea for her to return to him. She did not reply to the said letters and there was no response from her. It appears that the respondent's father also wrote a letter dated 20.7.1990 to the appellant's father to which the appellant's father sent a reply dated 24.7.1990. In these letters they traded allegations blaming each other for what had happened. Subsequently in 1993 there was an exchange of notice correspondence between the parties and ultimately the respondent filed a petition for divorce.

Now, the learned trial Judge who made an attempt to bring about reconciliation between the parties and when the attempts failed recorded their oral evidence had ample opportunity of observing their demeanour and it apparent that he has accepted the oral evidence of the husband and his father in preference to that of the wife and her father. Their evidence was read before me. I was taken through the letters written by the husband, his father and the wife's father and in my opinion it cannot

be said that the learned trial Judge erred in accepting the respondent's version.

Now once the evidence of the husband is accepted, it follows that the appellant left the matrimonial home on 24.5.1990 without the consent and against the wish of the respondent and she did so without reasonable cause. Her failure to respond to the letters written by her husband shows that she had no intention of returning. She was, therefore guilty of desertion and since the desertion continued for a period of more than two years immediately preceding the presentation of the petition, the husband was entitled to a decree of divorce.

However, the finding that the wife was guilty of desertion has been challenged on a number of grounds. It was submitted that the appellant was compelled to leave the matrimonial home because she was ill-treated by her husband and in-laws and she was frequently beaten, abused and taunted. It is submitted that it was the respondent who was responsible for driving out the appellant from the matrimonial home. The learned Advocate for the appellant contended that the fact that the appellant had approached Jyoti Sangh itself was evidence of the fact that the appellant was ready and willing to go to her matrimonial home. In this connection, reliance is placed on the complaint dated 10.4.1993 (Exh.73) which was made to the Jyoti Sangh. He submitted that the husband did not remain present even after intimation from the Jyoti Sangh but he gave a notice for divorce. It is contended that in order to constitute desertion, mere separation was not enough but there must be an intention to leave the matrimonial home permanently. The wife had no animus deserendi and she cannot be held guilty of desertion.

Now it is true that the appellant-wife did make a complaint to the Jyoti Sangh (Exh.73) in which she made allegations of ill-treatment and beating and there was also an allegation of demand for dowry. But as against that, when the respondent-husband wrote the letters dated 4.7.1990 and 24.7.1990 imploring the appellant to come back, there was no response from the appellant which shows that she had no intention of going back to the matrimonial home. As for allegations of ill-treatment and demand for dowry, the same are denied by the husband. Once the husband's oral evidence is accepted, it means that the allegations made by the appellant were not true. It appears that the appellant made an application on 19.6.1993 under Section 125 of the Code of Criminal Procedure, 1973 claiming maintenance but on that application on 15.1.1994, an order was made by consent

awarding Rs.350/- per month as maintenance to the wife. By that time, the husband had already filed the present petition. In the present case, the impression that is gathered from reading the entire evidence is that there is a ring of truth in what the husband wrot in his letters dated 4.7.1990 and 24.7.1990 and once his version is accepted it follows that the appellant-wife left the matrimonial home on 24.5.1990 without the consent and against the wish of the respondent and without reasonable cause and with the intention of not returning to matrimonial home. Hence the ingredients of desertion are satisfied and the learned trial Judge rightly held that she was guilty of desertion. It is also proved that the desertion was for a continuous period of two years before the petition was filed. The respondent-husband was therefore entitled to a decree of divorce on the ground of desertion.

The learned trial Judge has also held that the appellant-wife was guilty of cruelty. However, the evidence does not disclose that the wife was guilty of conduct of such a character as to cause in the mind of the respondent a reasonable apprehension that it will be harmful or injurious for the respondent to live with her. It is, therefore, not possible to confirm the finding of the learned trial Judge on this point. The decisions of the Supreme Court in Romesh Chander vs. Smt. Savitri, (AIR 1995 SC 851) and in Shobha Rani vs. Madhukar Reddy (AIR 1988 SC 121) cited on behalf of the respondent-husband do not help him on this point.

The result of the above discussion is that the decree of divorce granted by the trial Court has to be confirmed on the ground of desertion. The appeal, therefore, fails and is accordingly dismissed. No order as to costs.

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